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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

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# No. 667

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ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
*Petitioner,*

*vs.*

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF AMICI CURIÆ.

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## BRIEF AMICI CURIÆ

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It is submitted that the judgment below should be reversed for the following reasons:

I. **The Court of Appeals erred in holding that Title VII of the Revenue Act of 1936 relied upon in defense to this case need not be tested under the Fifth Amendment to the Constitution.**

The opinion of the Court of Appeals is to the effect that:

1. This is not a suit at common law but against the United States, and

2. That the United States, being a sovereign, can decide when it may be sued, or withdraw the right of suit altogether and, hence

3. Since Title VII of the Revenue Law of 1936 attempts to deprive the court of jurisdiction of this kind of suit, it

is not necessary to consider whether that law is constitutional.

If this opinion is correct, then taxpayers whose taxes are paid are no longer protected by the Fifth Amendment to the Constitution; and as to all new taxes, the whole theory of corrective justice by way of collection and refund is destroyed. The taxpayers' only remedy will be by way of injunction.

It is here contended that the foregoing involves a total misapprehension of the purpose and the effect of the Fifth Amendment.

In the collection of taxes, it is the government which proceeds against the taxpayer; not the taxpayer against the government.

*In the early days,* before the system of refunds was established, the acts of Congress for excise and other taxes provided taxpayers a day in court as to the legality or erroneous assessment of taxes *before* the taxes were collected. This has been pointed out in the case of *Phillips* v. *Commissioner,* 283 U. S. 589, at page 595 (footnote). It is there also said, pages 595-597:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. *Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights,* summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham* v. *United States,* 92 U. S. 85, 88-89; *Springer* v. *United States,* 102 U. S. 586, 594; *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States* v. *Woo Jan,* 245 U. S. 552; *Ng Fung Ho* v. *White,* 259 U. S. 276, the

statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue.

* * * * * * *

"Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Rowland*, 196 U. S. 631, 631. * * *" (Emphasis supplied.)

It will be noticed in the foregoing case that the Supreme Court had in mind *the total effect of the Fifth* Amendment which provides that no person shall be deprived of life, liberty *or property* without due process. It further recognizes that in cases of personal liberty the defendant is granted an earlier hearing than in the taking of property. *But the right to a hearing is guaranteed by the system of refunds in all tax cases.* Without this guaranty, where adequate opportunity is afforded for a later judicial determination of legal rights, those legal rights must be granted *before* the taxpayer is deprived of his property.

Also, in all of the following cases, the Supreme Court has recognized the right of the government to take property for taxation in advance of a determination of the validity of the taking; but, by providing for unqualified refunds, has established a *system of corrective justice* which adequately complies with the Fifth Amendment to the Constitution:

*State Railroad Tax Cases*, 92 U. S. 575, 613;
*Snyder* v. *Marks*, 109 U. S. 189;
*Dodge* v. *Osborne*, 240 U. S. 118;
*United States* v. *Jefferson Electric Co.*, 291 U. S. 386 395-396.

It must also be noticed that it has been specifically held by the Supreme Court that, with respect to the collection *and refund* of taxes, the law must comply with the Fifth Amendment to the Constitution, *and that the authority of Congress to withdraw the consent of the* **United States** to *be sued is no adequate argument.*

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, the court had under consideration the validity of Section 611 of the Revenue Act of 1928 which provided that taxes assessed or paid after the period of limitation should not be refunded to the taxpayer where the taxpayer had filed a claim in abatement or the collection of the tax had been stayed. The court tested this act under the due process clause and held it valid as a curative statute, but then said, pages 430-431:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen & Company, supra,* at p. 391. The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal and not against the United States. *Sage* v. *United States,* 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Company,* 257 U. S. 1, 4, 5. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, *it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.* See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 679, 680." (Emphasis supplied.)

To the same effect was *United States* v. *Jefferson Electric Company,* 291 U. S. 386 at 403, citing the foregoing case.

This is a suit against the Collector: "The one who committed the wrong"; the one who, in the case of *Rickert Rice Mills Company* v. *Fontenot*, 297 U. S. 110, this court held to be a trespasser. In the foregoing case and in the following cases, the Supreme Court has recognized that suits against collectors are personal actions and not governed by the same rules as suits against the United States:

*Sage* v. *United States*, 250 U. S. 33, 37;
*Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1;
*Union Trust Co.* v. *Wardell*, 258 U. S. 357;
*Levy* v. *Wardell*, 258 U. S. 543, and
*Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 398.

It should also be noticed that Title VII of the Act of 1936 on which the Government relies is not merely an attempt to withdraw the right of the United States to be sued. The sections relating to that subject are inseparably connected with the other parts of the statute; so that the total effect of the act is to deny the fundamental right of the taxpayer to a refund of all taxes paid in *any* suit.

If the government as a sovereign has the power to deny the taxpayer any day in any court, either against a collector or the United States, then the only way in which the validity and application of taxing laws can be tested by the taxpayer is by way of injunction which, under the statutes, is denied to him. Of course, if all other remedies are closed, the courts would be obliged to grant injunctions in all cases of illegal taxes. But this would throw the burden upon the courts of examining into income tax returns to find out whether they have been properly computed, as well as to examine into all other taxes, including the question of the constitutionality of the levies.

Also, if the Court of Appeals is correct, and the princi-

ple of sovereign immunity is applicable in this case, Congress could abolish the writ of *habeas corpus* (so far at least as it is protected under the Fifth Amendment.)

The truth is that the right to sue the collector for recovery of a tax that had been paid is not in reality a grant of the sovereign to the individual. It is a practical substitution for the right to defend before payment, by injunctive process or otherwise. And since the government can deny the right of injunction against the collection of the tax (thereby forcing its payment) only by giving a remedy to collect back, it may not grant such remedy until the tax is paid and afterward wipe it out.

We therefore submit that Title VII of the Revenue Act of 1936 which attempts to take away the jurisdiction of the court in this case, and denies the right to sue for all taxes paid in any case, must be tested under the Fifth Amendment to the Constitution.

**II. Title VII of the 1936 Revenue Act Denies to the Taxpayer due process of law, and is therefore unconstitutional.**

Statutes relating to refunds are unconstitutional where they do not furnish adequate opportunity for a judicial determination of legal rights, and all statutes relating to taxation are unconstitutional which are arbitrary, unreasonable, oppressive or unjust. *Phillips* v. *Commissioner*, 283 U. S. 589; *Davidson* v. *New Orleans*, 96 U. S. 97; *Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330; *Hoeper* v. *Tax Commission*, 284 U. S. 206.

Title VII of the Revenue Law of 1936 is unconstitutional on all the foregoing grounds.

It will not be denied that, when the taxes were paid which are in question in this case, and when the claim for refund

was filed and when this suit was brought, the taxpayer had a right to a refund of all the taxes which it had paid.

After the suit was brought, Congress passed the Revenue Act of 1936. Title VII of this Act is relied upon as the only defense to this case.

Title VII does not purport to deny all refunds to taxpayers.

Title VII provides that no refund of Agricultural Adjustment Act taxes shall be made or allowed unless the claimant establishes that he bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor, nor shifted such burden directly or indirectly.

This is the principal provision of Title VII upon which everything else is founded. No refunds are allowed at all unless the taxpayer can prove that he did not shift the burden of the tax. And the burden of making the proof is on the taxpayer.

Section 907 of the Act then provides for evidence and presumptions with respect to proof of the ultimate question of whether or not the taxapayer bore the burden of the processing tax or shifted it to others. Section 907 provides: (1) That it will be *prima facie* evidence that the taxpayer bore the burden to the extent that the average margin per unit of commodity processed was lower during the tax period than the average margin was during the period before and after the tax.

The average margin is then defined to be the difference between (1) the average gross sales value of the articles processed less (2) the average cost of the commodity and the processing tax paid. These margins are obtained (1) for a period of twenty-four months prior to the tax, and (2) for a period of six months after the tax, and (3) for the tax period. The margin in the two periods before and

after the tax are averaged and compared with the margin for the tax period.

Thus Section 907 allows a presumption in favor of the taxpayer to the extent that the difference between average cost and average selling price for certain periods before and after the tax is greater than the average difference during the period of the tax.

But this presumption may be rebutted by the commissioner or the taxpayer by almost any kind of proof. The Act provides for certain proof that will be especially allowed. The first proof specified is:

*Proof that the difference or lack of difference between the average margin for the tax period, and the average margin for the period before and after the tax was due to changes in factors other than the tax.*

The foregoing are the essential features of the limitations placed upon the refund to taxpayers. These limitations contemplate that the taxpayer cannot get back any of the tax paid unless and only to the extent that he himself can prove that he bore the burden of the tax.

And the statute itself makes it apparent that this proof cannot be made.

We do not refer to the complicated accounting that would be involved. That indeed is a heavy burden on the taxpayer and for most taxpayers would be technically impossible except by the use of approximations. But this is not the point here made. A *fundamental impossibility* exists in two respects:

1. The presumption allowed in Section 907 has no rational connection with the ultimate fact presumed, and

2. There is no way by which anyone can determine the ultimate fact.

1. *The presumption is unconstitutional:*

This Court has held, with reference to presumptions provided in statutes, that it is essential for the legality that there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from the proof of another shall not be so unreasonable as to be a purely arbitrary mandate. (*McFarlane* v. *American Sugar Co.*, 241 U. S. 79, page 86; *Bailey* v. *Alabama*, 219 U. S. 219; *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlanta R. R. Co.* v. *Henderson*, 279 U. S. 639).

Section 907 of Title VII does not comply with this requirement. The ultimate fact here to be proved is as to whether or not the taxpayer obtained the payment of his tax from someone else. The whole statute presumes that he did obtain the payment of the tax from someone else; but he is allowed to prove that he did not; and it is *prima facie* proof that he did not if he shows an unfavorable margin between cost and selling price during the tax period.

A difference between the cost of an article and its selling price or its sales value cannot and does not indicate whether or not the processing tax was collected from someone else.

This is true for two reasons:

(a) Prices of cotton and of textiles are made in the open market in competition. The tax was a manufacturer's tax fixed on the processing of the article. It was in all respects like the tax before this court in *Liggett & Myers Tobacco Co.* v. *United States* (57 Sup. Ct. Rep. 239), where this Court held that a stamp tax on tobacco paid by the manufacturer was not a sales tax and was not a burden upon the purchaser. In that case the government's brief said:

> "The tax was a prior ordinary burden of taxation, and, like an income tax or a property tax, represented a part of the manufacturing cost, • • •. The vendee

> neither directly nor indirectly paid the tax, as a tax, but paid a fixed price which might or might not have included the full manufacturing cost of the article including the manufacturing tax thereon."

In *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, it was stated that, under the facts in that case, the tax on transportation was upon the seller. The court said, page 579:

> "the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. *United States* v. *Normile,* 239 U. S. 344, 348. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale."

In *Cornell* v. *Coyne,* 192 U. S. 418, it was held that a general tax on filled cheese which was made for export was only a tax or duty on the manufacturing of articles in order to prepare them for export. And, if a farmer raises cattle with the purpose of exportation, and in fact exports them:

> "Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the Constitutional provision [prohibiting taxes on exports] is that *no burden* by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated."

In *Lash's Products Company* v. *United States,* 278 U. S. 175, 176, it was said of a manufacturer's tax on soft drinks:

> "The phrase 'passed the tax on' is inaccurate as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.,* 12 Fed. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for

the goods because of the seller's obligation, but that is all."

Thus it has been established that the tax and the burden of the tax are both on the taxpayer. Except in cases of special contract, all goods are sold and services rendered for value received, and the person who pays real estate or income or manufacturing taxes necessarily bears the burden. And no one can determine from the difference in the margin whether or not the tax is included any more than this can be determined with respect to other taxes, wages or overhead costs.

(b) The presumption also leaves out the element of costs.

If a manufacturer makes a profit in any year, then in a general sense the burden of all his costs and all his taxes has been passed on to his purchasers.

If he makes a loss, perhaps he has borne the burden.

At all events, the burden might be shifted to laborers or absorbed in the price of labor or other costs. This is especially important because of the higher labor costs required under the National Recovery Act which was then in force.

Of course, if costs are considered, the lack of uniformity in the application of any general theory becomes more apparent.

For, taking all elements into consideration, nothing can really be ascertained; yet the mere omission of costs from consideration in the presumption is fatal to the validity of the presumption.

2. *There is no way by which anyone can determine the ultimate fact.*

Section 907 sets up a supposed standard of comparison in order to determine a margin. It assumes that a comparison of margins obtained during the tax period with the period before and after the tax will determine the ultimate fact. But the first sentence allowing additional proof demonstrates the contrary. This sentence (above quoted)

allows either the commissioner or the taxpayer to prove that the difference between these average margins "was due to changes in factors other than the tax".

Thus it is apparent that in order to prove the shifting of the burden of the tax by a comparison of prices and costs there must be eliminated from the costs and values which are used, *all factors which do not relate to the tax.*

The Court will take judicial notice that the period of twenty-four months prior to May 12, 1933, when the A. A. A. became a law, was a period of great depression. Prices of all products were going down during that time. Beginning early in 1933 prices began to rise, principally because the N. R. A. was anticipated and was enacted June 16, 1933, and possibly because Congress passed the act relating to the devaluation of the dollar; possibly because the election of Mr. Roosevelt had brought about a general feeling of optimism; possibly because this was due in part to the A. A. A., which was enacted for the purpose of passing large sums of money to the farmers who in turn would become purchasers, and who, because they anticipated such funds, were willing to pay higher prices, both before and after the law was enacted.

The point is that, in order to prove from a comparison of values in goods (which really means prices), that a processor "passed on" a particular tax, it would be necessary to determine what part of an increased price was due to all of the foregoing elements and to eliminate such increase so that then the increase in price might possibly be regarded as due solely to the taxes paid by the processor. Of course even this would not be proof; but this is what the act intends.

No accountant, no economist and no court can make such a computation. The same kind of problem was before this court in *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, where Mr. Justice Holmes held that what the "real

value" of articles would be in a market not affected by combinations in restraint of trade, with exclusion of other abnormal influences and perhaps with exclusion of increased efficiency in machines; but with inclusion of the effect of the combination so far as it was economically beneficial, was a problem that "no human ingenuity could solve".

3. *The whole effect of Article VII of the Revenue Act of 1936 renders it unconstitutional.*

In the case of *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, the statute (relating to a sales tax) provided for the refund of *all* taxes erroneously paid. The taxpayer could get all he paid even if he had passed on the tax by adding it to the price of the goods, merely by furnishing a bond that he would account to his purchaser. And thus the refund would reach those who by special contract or understanding were entitled to it. Many taxpayers have no doubt specifically added A. A. A. taxes on to the price of goods, and thus have become indebted to purchasers. A refund to the taxpayers will enable them to discharge this debt, and may also benefit other purchasers in the future by a reduction of prices—although this cannot be perceived any more than a margin between cost and price can determine whether the burden was shifted.

Title VII makes no such provision. It grants nothing either directly or indirectly to non-taxpayers. The Senate Committee believed that most of the A. A. A. taxes were *"passed on"*. (*Senate Report 2156.*) If this is true, then the statute is an attempt retroactively to validate most of the A. A. A. exactions. Its effect is to amend the Agricultural Adjustment Act by fixing the so-called tax on those who were not then taxed and then denying all refund.

This violates the Constitution as did the laws considered in *Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermeyer* v. *Anderson*, 276 U. S. 440, and *Coolidge* v. *Long*, 282 U. S. 582.

A ratification cannot be made even if the A. A. A. provided for a tax; for nothing can be ratified which the Congress had no power to authorize in the first place. (*Stockdale* v. *Insurance Companies*, 87 U. S. 323; *United States* v. *Heinszen & Co.*, 206 U. S. 370.) Moreover this Court held in *United States v. Butler*, 297 U. S. 1, that these were not taxes. They were illegal exactions. These exactions could not be made even under the decision in *Head Money Cases*, 112 U. S. 580, because the court held that the end to be attained was not one falling within the power of Congress.

For the foregoing reasons, we contend that the taxpayer is entitled to a full refund of all moneys paid.

Respectfully submitted,

WILLIAM B. MCILVAINE,
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*As Amici Curiae.*

(8737-C.)